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In The
# Supreme Court of the United States
October Term, 1984

HONDA MOTOR CO., LTD.,
*Petitioner,*

v.

WALTER P. COONS,
*Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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## COUNTERSTATEMENT OF THE CASE

The petitioner, Honda Motor Co., Ltd., is seeking, by writ of *certiorari*, to have this Court review a decision by the Supreme Court of New Jersey holding that, based upon the balancing of equitable principles reaffirmed by this Court in numerous decisions, its previous declaration of invalidity of a portion of the New Jersey tolling statute, *N.J.S.A.* 2A:14-22,* on Commerce Clause grounds is to be prospectively applied as of August 3, 1983, the date of the declaration of invalidity. *N.J.S.A.* 2A:14-22 provides for a tolling of certain statutes of limitation against foreign corporations which are not represented in New Jersey for service of process.

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*N.J.S.A. 2A:14-22 states that,

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this State, against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this State or such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

This matter commenced as a personal injury suit brought by the respondent, Walter P. Coons ("Coons"), in the Superior Court of New Jersey, Law Division. Coons was the owner of a Honda CB 350 motorcycle and was injured as a result of an accident on October 30, 1974 while riding the cycle. Coons instituted legal action on October 30, 1978 naming as the primary defendants Honda Motor Company, Ltd. ("Honda"), the manufacturer of the motorcycle, and American Honda Motor Co. ("American Honda"), the distributor of Honda products in the United States. American Honda is a California corporation that maintains facilities in New Jersey. Honda is a Japanese corporation which is not authorized to do business in New Jersey. American Honda was served with a summons and complaint by mail at its Moorestown, New Jersey facility. Service of process upon Honda was effected as a result of a court order permitting substituted service upon a Washington, D.C. law firm, which acted as Honda's agent under the Traffic and Motor Vehicle Safety Act, 15 *U.S.C.* 1399(e) (App. 65a-66a).

The trial court dismissed American Honda as a defendant because the suit was instituted beyond the two-year statute of limitations under *N.J.S.A.* 2A:14-2 (App. 71a). Honda thereafter filed a motion for summary judgment seeking dismissal of the suit also on the basis that the complaint was instituted beyond the two-year statute of limitations. The trial court denied the motion and held that the two-year statute had been tolled by *N.J.S.A.* 2A:14-22 since Honda was a foreign corporation which was not represented in this State by a person upon whom process could be served. The trial court further held that the statute was consistent with the Equal Protection

Clause of the Federal Constitution (App. 69a-70a). Upon appeal, the Superior Court of New Jersey, Appellate Division, affirmed the judgment of the trial court. Honda filed a motion for leave to appeal to the Supreme Court of New Jersey which was denied. Following the filing by Honda of a notice of appeal with this Court, an order was entered on March 8, 1982, vacating the judgment of the Appellate Division and remanding the matter to the Appellate Division for further consideration in light of *G.D. Searle & Company v. Cohn*, 455 *U.S.* 404 (1982). The Attorney General intervened on the remand in support of the constitutionality of *N.J.S.A.* 2A:14-22. In the *Searle* case, this Court sustained the validity of *N.J.S.A.* 2A:14-22 on Due Process and Equal Protection grounds, but remanded the case for further consideration in light of a Commerce Clause challenge. On September 14, 1982, the Supreme Court of New Jersey directly certified this case pending unheard in the Appellate Division.* (App. 73a).

On August 3, 1983, the New Jersey Supreme Court issued the opinion and judgment in *Coons v. American Honda Motor Company*, 94 *N.J.* 307, 463 *A.*2d 921 (1983) *(Coons I)*, which determined that,

> 1. The only formal means by which a foreign corporation can become represented and thus designate an agent for the purpose of accepting service of process in New Jersey is by receiving a certificate of authority from the New Jersey Secretary of State to do business in New Jersey under *N.J.S.A.* 14A:13-4.

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*Pursuant to *N.J. Ct. R.* 2:12-2, the Supreme Court of New Jersey may directly certify an appeal pending unheard in the Superior Court, Appellate Division.

2. The only means by which a foreign, unrepresented corporation could avoid the tolling of the applicable statute of limitations under *N.J.S.A.* 2A:14-22 is by designating an agent upon whom process can be served in the context of securing a certificate of authority to do business in New Jersey from the New Jersey Secretary of State.

3. The tolling provision, *N.J.S.A.* 2A:14-22, is violative of the Commerce Clause of the United States Constitution because it imposes a "forced licensure" upon an unrepresented, foreign corporation by requiring a certificate of authority from the New Jersey Secretary of State as the only means for such corporation to be represented in New Jersey and thus avoid the tolling effect of the statute.

4. The decision is to,

> . . . be given retrospective effect, consistent with the general rule applied in civil cases that a new ruling shall apply to all matters that have not reached final judgment. See *Fox v. Snow*, 6 *N.J.* 12, 14 (1950). [App. 78a].

Following the decision in *Coons I*, Coons filed a petition for rehearing with the Supreme Court of New Jersey regarding all of the issues previously considered. The petition for rehearing was granted solely on the issue of retroactive application of the decision in *Coons I*. The Supreme Court of New Jersey thereafter issued an opinion and judgment, dated June 13, 1984, in *Coons v. American Honda Motor Co., Inc.*, 96 *N.J.* 419, 476 *A.*2d 763 (1984) *(Coons II)*, which held that the invalidity of *N.J.S.A.* 2A:14-22 on Commerce Clause grounds warranted a prospective application of *Coons I* as of August 3, 1983, the date of that decision. The prospective holding applied to all litigants, including the participating defendant and *amici*.

The Supreme Court of New Jersey, in reaching its decision on the prospectivity issue, applied the equitable balancing test best typified in *Chevron Oil Co. v. Huson*, 404 *U.S.* 97 (1971), and *Lemon v. Kurtzman*, 411 *U.S.* 1921 (1973) *(Lemon II)*. The court noted that since its decision in *Coons I* was the equivalent of a new rule of law clearly not anticipated and since justifiable reliance was placed on a system that provided for a tolling of statutes of limitation with respect to unrepresented, foreign corporations, the holding of prospectivity was proper and consistent with the relevant precedents of this Court.

## ARGUMENT

### In Accordance With The Equitable Standards Established By This Court, The Supreme Court Of New Jersey Correctly Determined To Apply The Invalidity Of N.J.S.A. 2A:14-22 On A Prospective Basis.

The applicable common law doctrine initially required the determination of a statute's unconstitutionality to be retroactive on the basis that the statute was ". . . inoperative as though it had never been passed." *Norton v. Shelton Cty.*, 118 *U.S.* 425 (1886). In *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 *U.S.* 371, 374 (1940), this Court recognized the *Norton* doctrine as being overly broad and subject to rejection in the context of public policy concerns regarding the justifiable reliance upon existing law:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have con-

> sequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determination deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

Subsequent decisions by this Court have clearly eroded the *Norton* doctrine and have substituted an equitable balancing test to determine whether a statute's invalidity is to be prospectively or retroactively applied.

That balancing test is best illustrated in *Chevron Oil Co. v. Huson*, 404 *U.S.* 97 (1971), and *Lemon v. Kurtzman*, 411 *U.S.* 192 (1973) *(Lemon II)*. Prior to *Chevron, supra*, this Court held in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 *U.S.* 352 (1969), that state law rather than admiralty law, including state statutes of limitation, applied to personal injury actions relating to fixed structures on the Outer Continental Shelf. *Chevron* involved a suit for personal injury suffered by the plaintiff while working on the defendant's drilling rig located on the Outer Continental Shelf. At the time the *Chevron* suit was instituted, the two-year statute of limitations under admiralty law was deemed applicable. The *Chevron* suit was filed within two years of the injury but outside the one-year statute of limitations governing under state law. The *Chevron* Court noted that in the last few decades it had recognized the doctrine of nonretroactivity outside the criminal area many times in both constitutional and nonconstitutional cases (404 *U.S.* at 106) and translated those holdings into a three-part test to determine whether a retroactive application was warranted:

> In our cases dealing with the nonretroactive question, we have generally considered three separate

> factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., *Hanover Shoe v. United Shoe Machinery Corp., supra,* at 496, 20 *L.Ed.*2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen v. State Board of Elections, supra,* at 572, 22 *L.Ed.*2d at 20. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker, supra,* at 629, 14 *L.Ed.*2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma, supra,* at 706, 23 *L.Ed.*2d at 652. [404 *U.S.* at 106-107].

In applying these factors, this Court concluded that the state statute of limitations should not be applied retroactively. It noted that *Rodrigue, supra,* was not only a case of first impression but also overruled prior lower court decisions which were binding. It was thus proper for the plaintiff to have relied on the "existing" law at the time suit was instituted. This Court opined that substantial inequitable results would be produced by a retroactive application of *Rodrigue* since the plaintiff had suffered serious injury for which he may be barred from further relief because of a sudden change in the applicable statute of limitations.

In *Lemon II, supra,* in which this Court determined that its holding in *Lemon I** was to be given prospective effect, Chief Justice Burger, writing for the Court, held that the abandonment of the *Norton* doctrine was compelled by the "recognition that statutory or judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." 411 *U.S.* at 199. He stated that the process of reconciling constitutional concerns reflected in a new rule of law with reliance interests founded upon the old law presents a difficult issue which must incorporate various considerations, including the relations and conduct of parties, of rights that may have vested, of status, of prior determinations that have been deemed final and public policy. 411 *U.S.* at 199. He noted, however, that, "reliance interests must weigh heavily in the shaping" of proper equitable remedies. 411 *U.S.* at 203. Chief Justice Burger further stated that,

> Here, we are not considering whether we will apply a new constitutional rule of criminal law in reviewing judgments of convictions obtained under a prior standard; the problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional. . . . But however we state the issue, the fact remains that we are asked to re-examine the District Court's evaluation of the proper means of implementing an equitable decree. [411 *U.S.* at 199].

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*Lemon II* is distinguishable from *Lemon I* (*Lemon* v. *Kurtzman,* 403 *U.S.* 602 (1971)), in which this Court invalidated a Pennsylvania statutory program to reimburse nonpublic sectarian schools for designated secular educational services.

Thus, the contention by petitioner that the issue of retroactivity-prospectivity in this matter involves questions of constitutional dimension is simply not accurate. This issue relates to essentially equitable considerations which must be closely scrutinized to reach a fair result.

The Supreme Court of New Jersey applied the principles enumerated in *Chevron* and *Lemon II* in determining that the invalidity of *N.J.S.A.* 2A:14-22 was to receive prospective application. Initially, in applying the three-part test of *Chevron,* the court noted that its holding of invalidity in *Coons I* under the Commerce Clause was not foreshadowed and constituted a new principle of law. The tolling statute, *N.J.S.A.* 2A:14-22, had been on the books since 1949 and a tolling provision had been a fixture of New Jersey law since 1820. See *Lemke v. Bailey,* 41 *N.J.* 295, 298, 196 *A.*2d 523, 525 (1963). The first mention of a potential Commerce Clause problem by an appellate court was this Court's decision in *G.D. Searle & Co. v. Cohn, supra.* Thus, as of 1978, the year in which plaintiff contemplated this law suit, there was no indication of the invalidation of the tolling statute as to foreign, unrepresented corporations on Commerce Clause grounds. The New Jersey Supreme Court thus aptly concluded that,

> Hence, the declaration of *Coons I* was hardly foreshadowed; and although the case did not literally alter precedent because there was none on the *holding* of the case, it amounted to a "statement" in a matter of first impression—and thus "new law." [App. 16a].

With regard to another facet of the *Chevron* test, the consideration of reliance, it is appropriate to recognize that potential New Jersey plaintiffs were justified in

relying on the existence of the tolling statute in believing that causes of action against foreign, unrepresented corporations would be preserved in New Jersey. Obviously, the retroactive invalidity of the tolling statute may forever bar such plaintiffs from instituting legal action in this State. For example, there may exist potential plaintiffs, who had a cause of action against a foreign, unrepresented corporate defendant which was amenable to long-arm service in New Jersey during the assumed tolling of the statute of limitations.* Such plaintiffs, in strict reliance on the tolling statute and for reasons of convenience, strategy, expense and the like, opted to refrain from utilizing long-arm service as the only available means for instituting action in this State within the statute of limitations. Such potential plaintiffs would be seriously prejudiced by a retroactive application of *Coons I* since, but for the tolling statute, timely suit would have been commenced in New Jersey. In addition, there may be potential plaintiffs who had a substantial cause of action against a foreign, unrepresented corporate defendant which was not amenable to long-arm service in New Jersey. Such plaintiffs, but for the tolling statute and the anticipation of filing suit in New Jersey sometime in the future, would have presumably made effort to institute action in a foreign jurisdiction in order to prosecute the cause of action. The expense and inconvenience of instituting such an action would have been justified in light of the seriousness and/or substantiality of the cause of

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*In *Velmohos v. Maren Engineering Corp.*, 83 *N.J.* 282, 416 *A.*2d 372 (1980), the Supreme Court of New Jersey held that the tolling effect was applicable even to foreign, unrepresented corporations that were subject to long-arm service of process.

action. Clearly such plaintiffs would be severely prejudiced by a retroactive application of the tolling statute's invalidity particularly if the availability of the out-of-state forum were now foreclosed because the applicable statutes of limitation had run.

It is obviously difficult to gauge the number of plaintiffs that may be affected by a retroactive holding and it is also difficult to determine the prejudice to be suffered by those actual or potential plaintiffs who may have relied on the tolling statute. It is clear, however, that the tolling statute must have served a useful purpose in preserving causes of action for New Jersey residents regarding foreign, unrepresented corporate entities otherwise the New Jersey Legislature would not have enacted such a provision. The salutary purpose served by such legislation was unequivocally recognized in *G.D. Searle & Company v. Cohn, supra.* As previously noted, the tolling provision has represented a fundamental facet of New Jersey's jurisprudence for many years. The public had no basis for anticipating a judicial ruling that the tolling statute was invalid and, therefore, had no opportunity to structure its legal strategy accordingly. Thus, in fairness to potential or actual plaintiffs who justifiably relied on the validity of the tolling provision, the holding of unconstitutionality in *Coons I* was properly applied prospectively. Such a holding terminated the tolling of the statutes of limitation applicable to causes of action against foreign, unrepresented corporate defendants on August 3, 1983, the date of the decision in *Coons I,* and triggered the running of the statutes of limitation as of that date.

Further compounding the egregious inequity that would result from a retroactive holding of *Coons I* is the

recent amendment to *N.J.S.A.* 2A:14-22 by the enactment of New Jersey Public Law 1984, Chapter 131. This law was approved and became effective on August 23, 1984. The amendment added the following italicized paragraph to *N.J.S.A.* 2A:14-22:*

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:

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*N.J. Public Law 1984, Chapt. 131, was introduced in the New Jersey Legislature as Senate Bill 953 (1984). The Senate Judiciary Committee Statement to Bill 953, dated February 23, 1984, clearly identifies that its purpose was to remedy the unconstitutional defect found in *Coons I:*

> *N.J.S.* 2A:14-22 tolls the running of the statute of limitations in civil actions against foreign corporations that are not represented in New Jersey and thus cannot be reached with service of process. This bill would provide that a foreign corporation would be deemed represented in New Jersey for the purpose of *N.J.S.* 2A:14-22 if the corporation filed with the Secretary of State a notice designating a representative to accept service of process.
>
> The bill was introduced in response to a recent New Jersey Supreme Court decision, *Coons v. American Honda Co., Inc.*, 94 *N.J.* 327 (1983). In that decision, the court determined that in order to be "represented" in the context of *N.J.S.* 2A:14-22, a foreign corporation must obtain a certificate to do business in New Jersey. The court ruled that this requirement was in violation of the commerce clause of the U.S. Constitution in that it unduly burdened interstate commerce by requiring a foreign corporation engaged exclusively in interstate commerce to obtain such a certificate.
>
> The filing of a notice designating a representative to accept process is a less burdensome requirement than obtaining a certificate to do business. Therefore, by providing that a foreign corporation would be deemed represented for purposes of *N.J.S.* 2A:14-22 if such a notice were filed, S-953 is intended to meet the Supreme Court's objections as stated in the *Coons* decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations.

> 14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of times limited in said sections, or if any corporation or corporate surety not organized under the laws of this State, against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this State shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation. *A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process.*

The amendment to *N.J.S.A.* 2A:14-22 provides that foreign, unrepresented corporations may file a notice with the New Jersey Secretary of State designating a representative to accept service of process in order to be represented in New Jersey and thereby avoid the tolling effect. Accordingly, as of May 23, 1984, foreign, unrepresented corporations no longer need to obtain a certificate to do business in New Jersey as the sole means of avoiding the tolling effect of *N.J.S.A.* 2A:14-22. Therefore, the constitutional defect of the statute determined in *Coons I* has been cured.

In light of the statutory amendment, the equitable scales even more than ever tip in the direction of a prospective holding of *Coons I*. A prospective holding is clearly appropriate in order to maintain continuity in the judicial system and to avoid the disruptive effect of having certain causes of action against foreign corporations relating to a period after August 23, 1984 tolled while earlier causes of action would be barred by the applicable statutes of limitation.*

The final facet of the three-part test enunciated in *Chevron, supra,* relates to the purpose of the rule in *Coons I*. Clearly *Coons I* invalidated that portion of the tolling statute which violated the Commerce Clause. Notwithstanding petitioner's contention that the prospective holding of *Coons I* essentially perpetuates a wrong and results in a "new" violation of the Commerce Clause, that argument overlooks the equitable principles that must be considered in this analysis. This argument was considered and properly rejected by the Supreme Court of New Jersey:

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*As a practical matter, the prospective holding of *Coons I* as of August 3, 1983 does not create a significant gap in the tolling effect. The period between August 3, 1983 and August 23, 1984 (1 year and 20 days), a period during which there would be no tolling effect upon foreign, unrepresented corporations under a prospective holding of *Coons I*, is relatively short and would only affect those limited causes of action subject to a 1 year statute of limitations and occurring between August 3, 1983 and August 22, 1983. The only applicable statute with a 1 year limitation is *N.J.S.A.* 2A:14-3, which relates to libel and slander actions. Thus, a prospective holding of *Coons I*, in light of the recent statutory amendment, would retain the tolling effect for most causes of action involving foreign, unrepresented corporate defendants without any gap.

> Finally, following *Chevron, supra,* 404 *U.S.* at 106-07, 30 *L.Ed.*2d at —, we look to the purpose of the rule in *Coons I.* In its starkest terms, that determination had as its purpose the outlawing of so much of the tolling statute as violates the commerce clause. Defendant contends that not to apply the ruling retroactively would be to countenance unconstitutionality. But the argument overlooks the balancing of interests and impact, called for by our commitment to equitable principles. Those concerns are addressed above—the reliance of plaintiff and those similarly situated, and the absence of any showing that in fact defendant and corporate *amici* suffered a burden borne of a compulsion to register in New Jersey to permit recourse to the statute of limitations. On balance we are satisfied that the purpose of the prior ruling is fulfilled by excluding from the scope of the *Coons I* ruling only those actions already commenced as of August 3, 1983. [App. 18a].

Therefore, the Supreme Court of New Jersey appropriately concluded that the invalidity of the tolling statute does not warrant a *per se* retroactive holding. The reliance factor and concepts of equity, which support a prospective holding, are critical considerations in this analysis which the petitioner simply ignores. Thus, the prospective application of *Coons I* is consistent with the three-part test articulated in *Chevron, supra,* and comports with the equitable standards applied by this Court in civil litigation.

Petitioner suggests that the propriety for applying the balancing test in *Chevron, supra,* to determine issues of prospectivity-retroactivity has been severely undercut by *Lemon II, supra, New York v. Cathedral Academy,* 434 *U.S.* 124 (1977), and *United States v. U.S. Coin & Currency,* 401 *U.S.* 715 (1971), and that a *per se* rule of retroactivity should be applied where a state civil statute is

held unconstitutional. That conclusion is simply unsubstantiated by those decisions and is clearly incorrect. As previously noted, *Lemon II, supra,* reinforces the application of the equitable balancing test enunciated in *Chevron, supra,* in determining the propriety for prospective application of a judicial ruling declaring a state law unconstitutional. In *New York v. Cathedral Academy, supra,* a New York statute reimbursing religious schools for certain expenses was struck as unconstitutional. This statute was enacted *after* a Federal District Court had declared unconstitutional a similar statute relating to the previous school year. This Court, in applying the equitable considerations discussed in *Lemon II,* found a retroactive holding of the statute's invalidity proper since the New York legislature was aware of such invalidity at the time of enactment, since reliance on such ostensibly defective legislation was unwarranted and since a prospective holding would encourage state legislatures to undermine judicial rulings in the future. 434 *U.S.* at 130. Therefore, in applying the equitable balancing test in *New York v. Cathedral Academy, supra,* this Court concluded that a retroactive invalidation of the statute was proper, but only on grounds of equity and policy and not based on an alleged *per se* rule of retroactivity.

Similarly, no express or implied *per se* retroactivity standard can be surmised from *United States v. U.S. Coin & Currency,* 401 *U.S.* 715 (1971), in which this Court held that previous decisions interpreting the Fifth Amendment privilege against self incrimination to prohibit criminal convictions of gamblers who did not file required registration statements were to be retroactively applied. More recently, in *State v. Johnson,* 457 *U.S.* 537 (1982), in which a Fourth Amendment construction was deemed applicable

to all convictions not yet final at the time of the decision, this Court established that, in the criminal law context, a prospective holding would be proper if a decision constituted a "clean break with the past." The *Johnson* "clean break" test was somewhat modified in *Solem v. Stumes*, 55 *U.S.L.W.* 4307 (Feb. 29, 1984), holding that *Edwards v. Arizona*, 451 *U.S.* 477 (1984) (which established that once a suspect has invoked the right to counsel, any subsequent initiation of conversation by one other than the suspect violates that right) was to be applied prospectively because it constituted a new rule despite absence of a "clean break with the past." Thus, even in the criminal area, where a much stricter standard of retroactivity has been applied by this Court, a *per se* rule of retroactivity is not currently in vogue.

Moreover, petitioner overlooks a host of decisions by this Court which have sustained a prospective application of a holding that a civil statute is unconstitutional. See *Los Angeles Dept. of Water and Power v. Manhart*, 435 *U.S.* 702 (1978) (holding that sexual discrimination in funding of pension plan was to be prospectively applied in order to avoid disruption of the pension system and in recognition of valid reliance on the existing funding mechanism); *Buckley v. Valeo*, 424 *U.S.* 1 (1976) (a finding that certain facets of the Federal Election Campaign Act were unconstitutional was prospectively applied, thus granting Federal Election Commission's past decisions *de facto* validity based on considerations of reliance and sound public policy);* *Cipriano v. City of Houma*, 395 *U.S.* 701

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*In *Buckley v. Valeo, supra,* this Court further established that its holding was to be effective 30 days from the date of the decision in order to allow Congress an opportunity to rectify the provisions of the Federal Election Campaign Act found invalid.

(1969), and *City of Phoenix v. Kolodziejski*, 399 *U.S.* 701 (1970) (sustaining previous municipal financing arrangements later declared unconstitutional on the grounds of equitable principles); *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (recognizing the validity of past elections of local officials notwithstanding a finding that such elections were unconstitutional in order to avoid disrupting the local governing system). In each of these decisions relating to noncriminal litigation, the concern of this Court focused on legitimizing past conduct premised on lawful standards. Such a result comports with " . . . one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law." *San Antonio School District v. Rodriguez*, 411 *U.S.* 160 (1973) (Stewart, J., concurring).

The further contention by petitioner that the Supreme Court of New Jersey misconceived the prospective-retroactive determination as being a matter of "state law" is of no merit. As a practical matter, the Supreme Court of New Jersey applied the precedents established by this Court and explicitly noted that, "[t]he development of New Jersey's retroactivity law has proceeded on a track roughly paralleling that represented by the cases" decided by this Court (App. 11a). The Supreme Court of New Jersey, in framing the relief to be granted the petitioner, was possessed of "a large measure of . . . discretion . . . in deciding both the issues of prospective application or retrospective application and the time for which the new principle is to be deemed controlling." *State v. Vigliano*, 50 *N.J.* 51, 65-66, 232 *A.*2d 129 (1967), cited with approval in *Jenkins v. Delaware*, 395 *U.S.* 213, 218 (1969).

This large measure of discretion is best illustrated in *Bacchus Imports, Ltd. v. Dias,* 52 *U.S.L.W.* 4979 (June 29, 1984), which declared a Hawaii taxing statute, granting tax preferences to certain domestically produced wine and liquor manufacturers, in violation of the Commerce Clause. Having declared the taxing act unconstitutional, this Court was faced with the dilemma of formulating an appropriate remedy as to the extent and propriety of any refund claim. With respect to that issue, this Court stated that,

> These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the Federal constitutional issues involved may well be intertwined with, or their consideration obviated by, *issues of state law.* Also, resolution of those issues, if required at all, may necessitate more of a record than so far has been made in this case. We are reluctant, therefore to address them in the first instance. Accordingly, we reverse the judgment of the Supreme Court of Hawaii and remand for further proceedings not inconsistent with this opinion. [52 *U.S.L.W.* at 4983; emphasis supplied].

Thus, the means for formulating an appropriate remedy to implement the holding in *Bacchus, supra,* were left to the state court. Similarly, in *Salorio v. Glaser,* 93 *N.J.* 447, 461, *A.*2d 1100 (1983), *cert. den.,* 52 *U.S.L.W.* 3422 (Nov. 28, 1983), this Court declined to review a decision by the Supreme Court of New Jersey which gave a prospective application to the holding that the New Jersey Emergency Transportation Tax is unconstitutional. These cases further illustrate the wide latitude this Court has permitted the state courts in shaping remedies in light of an unconstitutional holding of a state law. This defer-

ence is based on the ability of state judiciaries to be more familiar with local concerns so as to balance the relevant equitable considerations and thereby formulate proper remedies.

The determination by the Supreme Court of New Jersey in *Coons II* comports with this Court's consistent confidence in the competency of the State judiciary to adjudicate and safeguard federal constitutional rights. In strict adherence to the standards to be considered in determining issues of retroactivity-prospectivity proclaimed by this Court, the New Jersey Supreme Court balanced the interests of actual or potential plaintiffs, the public policy of preserving causes of action and the consequences of a prospective holding of *Coons I*. The lower court's evaluation was based on reason and fairness in a manner consistent with the rulings of this Court. Clearly, the decision in *Coons II* of establishing a prospective holding for *Coons I* was proper and sound.

The petition for writ of *certiorari* plainly does not present a question of constitutional dimension which would warrant the granting of such extraordinary relief. Therefore, the petition should be denied.

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## CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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